YAP PENG SANG

v.

MENTERI KEMENTERIAN SUMBER MANUSIA MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[ORIGINATING SUMMONS NO: R1-24-4-96]
21 SEPTEMBER 1998

ADMINISTRATIVE LAW: *Remedies - Mandamus - Application made under s. 25(2) Courts of Judicature Act 1964 - Whether leave of court required - Rules of the High Court 1980, O. 53 r. 1(1)*

The plaintiff applied for a *mandamus* to direct the defendant to refer his representation made under s. 20(3) of the Industrial Relations Act 1967 to the Industrial Court for an award. His application was struck out as it was made without first obtaining the necessary leave of the court as required by O. 53 r. 1(1) of the Rules of the High Court 1980 ('the RHC').

By an amended originating summons, the plaintiff sought in the second prayer for an order under s. 25(2) and the Schedule to the Courts of Judicature Act 1964 ('the CJA') directing the defendant to perform the same. The defendant raised a preliminary objection in that the said second prayer was for an order in the nature of *mandamus* and as no prior leave of the court had been obtained by the plaintiff to apply for such an order, the said prayer should not be entertained.

Held:

[1] Whether the application sought is for an order of *mandamus* as mentioned in O. 53 r. 1(1) of the Rules of the High Court 1980, or for an order requiring any specific act to be done by any person holding a public office as mentioned in s. 44 of the Specific Relief Act 1950, or for directions, orders or writs, including writs of the nature of *mandamus* as mentioned in para. 1 of the Schedule to the Courts of Judicature Act 1964, the leave of the court as so required by O. 53 r. 1(1) of the Rules of the High Court 1980 must first be obtained as a condition precedent. Rule 1(2) to (4) of O. 53 lay down the steps to be taken by an applicant in order to obtain such leave.

[2] Section 25(2) of the Courts of Judicature Act 1964 provides that such additional powers as set out in the Schedule, which includes the powers to issue to any person or authority directions, orders or writs, including the writs of the nature of *mandamus*, shall be exercised only in accordance with any written law or rules of court (i.e. Rules of the High Court 1980) relating to the same.

[3] As the Specific Relief Act 1950 is the source of the power to grant an order of *mandamus* and O. 53 of the Rules of the High Court is the procedure for obtaining such an order, there could not be a distinction between the order sought in pursuant to para. 1 of the Schedule to the Courts of Judicature Act 1964 from the order mentioned in O. 53 of the Rules of the High Court 1980.

[4] The plaintiff's second attempt, which was by way of the additional powers of the High Court conferred by s. 25 of the Courts of Judicature Act 1964, was in reality is another application for an order of *mandamus*.

[5] The plaintiff should have applied for leave as required. As he did not do so, the said second prayer in the amended originating summons of the plaintiff was struck out with costs to the defendant. As to the application in the first prayer, a date will be fixed for the hearing of the same.

[Preliminary objection upheld; second prayer struck out with costs to the defendant.]

Case(s) referred to:

Chan Mun Poy v. Director-General of Telecommunications & Anor [1981] 2 MLJ 293 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour & Manpower & Anor [1983] 2 CLJ 7 ***(refd)***

Pahang South Union Omnibus Co Bhd v. Minister of Labour & Manpower & Anor [1981] 1 CLJ 83 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)
Industrial Relations Act 1967, s. 20(3)
Rules of the High Court 1980, O. 53 r. 1(1)
Specific Relief Act 1950, ss. 44, 49

For the plaintiff - D Kalaimany; M/s Kalai & Partners
For the defendant - Mahamad Naser Disa SFC

Reported by Ling Hea Hoon & M Maheswaran

JUDGMENT

Abdul Kadir Sulaiman J:

Ruling

By an amended originating summons filed on 20 June 1997, the plaintiff sought in the second prayer for an order under s. 25(2) and the Schedule to the Courts of Judicature Act 1964 directing the defendant to refer his

representation of 31 May 1994 made under s. 20(3) of the Industrial Relations Act 1967 to the Industrial Court for an award. The amendment to the originating summons was made following the striking out by the court of his original second prayer in the summons originally filed on 29 January 1996 for an order of *mandamus* in respect of the same purpose. The striking out was for the reason that the said application was made without first obtaining the necessary leave of the court as so required by O. 53 r. 1(1) of the Rules of the High Court 1980. On the date of the hearing of the said amended originating summons, the defendant informed the court that he has a preliminary objection to make on this second prayer of the plaintiff. As both parties agreed that each would make written submissions on the preliminary objection, the hearing was adjourned. The written submissions were subsequently submitted to the court.

The objection of the defendant is that the said second prayer of the plaintiff is a prayer for an order in the nature of *mandamus*. As such the said prayer cannot be entertained as no prior leave of the court had been obtained by the plaintiff to apply for such an order. It is being submitted that the additional powers conferred upon the court by s. 25(2) of the Courts of Judicature Act 1964 as set out in the Schedule thereto must be exercised by the court only in accordance with any written law or rules of court relating to the same. Such written law of rules of court is the Rules of the High Court 1980 itself which lay down the procedures to be followed when matters come to court for adjudication.

In his reply, the learned counsel for the plaintiff submitted that the application sought in the amended second prayer is distinct from an application for an order of *mandamus*. As such O. 53 of the Rules of the High Court 1980 does not apply. According to him, para. 1 of the Schedule to the Courts of Judicature Act 1964 empowers the court to issue directions or orders or writs. Hence each are independent remedies. As the issue of any writ of *mandamus* has been abolished in Malaysia by s. 49 of the Specific Relief Act 1950 (Act 137), what is left now is an order of *mandamus* which procedure to obtain. One is through the process of O. 53 of the Rules of the High Court 1980 which merely changes the form but not the substance of *mandamus*. However, the procedure before the court for an order requiring any specific act to be done by any person holding a public office is prescribed by s. 45 of the Specific Relief Act 1950 without requiring leave to be first obtained. In the circumstances, the procedure required under O. 53 of the Rules of the High Court 1980 does not apply to the order sought under the Specific Relief Act 1950. The Specific Relief Act 1950 is the source of the power of the court whereas O. 53 of the Rules of the High Court 1980 merely prescribes the procedure.

I find that the logic of the argument by the learned counsel for the plaintiff is very hard to follow. Whilst agreeing that the Specific Relief Act 1950 is the source of the power to grant an order of *mandamus* and O. 53 of the Rules of the High Court is the procedure for obtaining such an order, how can there be a distinction between the order sought in pursuant to para. 1 of the Schedule to the Courts of Judicature Act 1964 from the order mentioned in O. 53 of the Rules of the High Court 1980 when s. 25(2) of the Courts of Judicature Act 1964 from which flows the Schedule provides that such additional powers as set out in the Schedule, which necessarily includes the powers to issue to any person or authority directions, orders or writs, including the writs of the nature of *mandamus*, shall be exercised only in accordance with any written law or rules of court relating to the same. The rules of court can refer to nothing else now but the Rules of the High Court 1980. Order 53 r. 1(1) of the Rules of the High Court 1980 invites of no ambiguity that no application for an order of *mandamus* shall be made unless leave therefore has been granted in accordance with the rule, and r. 1(2) to (4) of O. 53 lay down the steps to be taken by an applicant in order to obtain such leave. Two authorities in point, though specifically touching on the matter in respect of an application for *certiorari*, but to my mind of equal application when it comes to deal with the matter of an order of *mandamus*, have something to say about this issue concerning leave to apply for an order. The first is *Pahang South Union Omnibus Co Bhd v. Minister of Labour & Manpower & Anor* [1981] 2 MLJ 199 where Abdoolcader J delivering the judgment of the Federal Court said at p. 204:

> The *proviso* to s. 25 of the Courts of Judicature Act specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same. The *proviso* limits or qualifies what precedes it and the whole section inclusive of the *proviso* is to be read in such a manner that they mutually throw light on each other and result in a harmonious construction. The powers conferred on the High Court in the Schedule to the Courts of Judicature Act are only enabling powers empowering the exercise of jurisdiction in respect of the matters specified therein but only in accordance with any written law or rules of court relating thereto. They are merely declaratory of the jurisdiction of the High Court and are subject to restrictions or conditions imposed by legislative provisions pertaining to their exercise and in relation to privative clauses subject to established judicial interpretation that the ouster of jurisdiction can only affect errors of law within the jurisdiction and not without nor if the decision sought to be impugned is a nullity. Section 25(2) of the Courts of Judicature Act does not confer any power as such but only indicates that there is power to make such orders specified in the Schedule thereto as may be necessary when power so to do is either provided for or is not excluded by some statutory provision and then only within the ambit of its content.

Whilst it is correct to say that s. 44 of the Specific Relief Act 1950 gives power to the judge to make an order requiring any specific act to be done by any person holding a public office, as in the present case the plaintiff by his second prayer has asked for an order that the defendant be directed to refer his representation under s. 20(3) of the Industrial Relations Act 1967 to the Industrial Court for an award, s. 25 of the Courts of Judicature Act 1964 imposes the restriction as to how the High Court could exercise that power in the manner it was sought. In this respect we have to fall back on O. 53 r. 1 of the Rules of the High Court 1980 as to how to go about it to achieve the purpose sought. To do so, it requires leave to be first obtained. But it was never done in this case by the plaintiff. He tried earlier by asking for an order of *mandamus* and for reason that leave was not first being applied the application by this second prayer was struck out. Now, he tries again but for fear of receiving the same fate, he did it by way of the additional powers of the High Court conferred by s. 25 of the Courts of Judicature Act 1964 which in reality is another application for an order of *mandamus.*

In *Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor* [1983] 2 MLJ 54, Abdoolcader FCJ delivering the judgment of the Federal Court said this at p. 55:

> Lord Hodson said in his judgment in *Secretary of State for Defence v. Ward* [1970] AC 394 (at p. 402): 'Procedural sections are usually mandatory and there is nothing which points to the contrary in this case.' In the matter before us the terms of O. 53 rr. 1 and 1A clearly reflect the imperative requirements which must be complied with before an application for certiorari can be made. Power in the High Court in regard to certiorari is provided for in the Courts of Judicature Act 1964 in para. 1 of the Schedule thereto which sets out the additional powers of the High Court referred to in s. 25(2) of the Act but the proviso to s. 25 specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same [*Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor.* [1981] 2 MLJ 199 at p. 204].

The same force applies to an application for an order of *mandamus* or any other similar order by whatever name called, for so long that the order sought is to require any specific act to be done by any person holding a public office, as the defendant is. In *Chan Mun Poy v. Director-General of Telecommunications & Anor* [1981] 2 MLJ 293 Wan Suleiman FCJ said:

> It seems to me that an application for an order of *mandamus* then would come under ss. 44 to 49 of the Act, (the Specific Relief Act 1950) and what counsel had said applies only to an application made in Malacca and Penang (see *Mallal's Rules of the Supreme Court* p. 724) so that the requirement of leave would not apply. But since June 1, 1980, after the coming into force of the Rules of the High Court 1980, leave would indeed be required under O. 53 r. 1(1).

On the matter of the additional powers conferred upon the High Court by s. 25 of the Courts of Judicature Act 1964, *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 is another source of authority to guide us. At p. 212, Edgar Joseph Jr FCJ said:

> Similarly, turning to the words 'in accordance with ... rules of court relating to the same', all these words mean is that the procedure to move an application for the prerogative orders shall be in accordance with the requirements of O. 53.

Then continuing at p. 214, his Lordship said:

> It follows, therefore, that while our O. 53 can only prescribe the procedure and practice to be followed by parties when applying for judicial review, the source of power enjoyed by our court to grant relief in judicial review proceedings is the prerogative jurisdiction inherited from the United Kingdom Courts and, most importantly, para. 1 of the Schedule read with s. 25 of the Courts of Judicature Act. The *proviso* to s. 25(2) and, more particularly, the Rules of the High Court, do not, and indeed cannot, narrow down or diminish or curtail the scope of the powers conferred upon our courts in judicial review proceedings.

Therefore, it is clear from the *dicta* of his Lordship above, that O. 53 of the Rules of the High Court 1980 lays down the procedure and practice to be followed in judicial review proceedings while para. 1 of the Schedule to the Courts of Judicature Act 1964 read with s. 25 of the Act is the source of the power enjoyed by the courts to grant such a relief. So, it is clear from the authorities that whether the application sought is for an order of *mandamus* as mentioned in O. 53 r. 1(1) of the Rules of the High Court 1980, or for an order requiring any specific act to be done by any person holding a public office as mentioned in s. 44 of the Specific Relief Act 1950, or for directions, orders or writs, including writs of the nature of *mandamus* as mentioned in para. 1 of the Schedule to the Courts of Judicature Act 1964, the leave of the court as so required by O. 53 r. 1(1) of the Rules of the High Court 1980 must first be obtained as a condition precedent.

As the plaintiff in this case has not so obtained the leave of the court to apply for the order sought in prayer two of his amended originating summons, the preliminary objection by the learned counsel for the defendant is sustained and accordingly the said second prayer in the amended originating summons of the plaintiff is hereby struck out with costs to the defendant. As to the application in the first prayer, a date will now be fixed for the hearing of the same.